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Nos. 00-568, 00-800, and 00-809

IN THE

Supreme Court of the United States

PEOPLE OF THE STATE OF NEW YORK AND THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *et al.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENT TRANSMISSION ACCESS POLICY STUDY GROUP

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ARGUMENT

Respondent Transmission Access Policy Study Group ("TAPS")[1] respectfully requests that this Court deny the petitions of the States and Dalton for writ of certiorari, seeking review of the District of Columbia Circuit's opinion. Because Dalton's petition is without merit and warrants little discussion,[2] TAPS addresses only the States' petition below.[3] TAPS believes that Petitioner Enron Power Marketing, Inc.'s position is correct, but because under the D.C. Circuit's opinion the Federal Energy Regulatory Commission ("FERC") may choose to exercise jurisdiction in the future over all interstate transmission by public utilities, including transmission used for "bundled"[4] retail electric sales, there is no need for the Court to review the issue now. However, should the Court grant States' petition then it should also grant Enron's petition to permit a complete assessment of the issues.

The opinion is reported at 225 F.3d 667, *amended*, 2000 U.S. App. LEXIS 15362 (D.C. Cir. Nov. 14, 2000).

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[1] TAPS is an informal association of municipal, cooperative and investor-owned utilities and other supporters in more than 29 states promoting open and non-discriminatory transmission access. Many TAPS members are entirely or predominantly transmission-dependent. States Pet. App. C-29. Unless otherwise noted or obvious all references herein are to States' Petition and Appendices.

[2] Contrary to Dalton's claim (Pet. 8), FERC based its order on a generic finding of *existing* undue discrimination in transmission services. *See* Enron Pet. App. D-192a, 213a, E-437a. Also, Dalton (Pet. 24) misreads *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), as barring FERC from ordering transmission service to cure undue discrimination, a matter not reached in the Court's decision.

[3] TAPS responds to questions 1, 2 and 4 of the States' Petition.

[4] In a bundled retail sale transmission and electric energy are provided and sold together under one rate, and in an unbundled sale they are provided and sold separately. Pet. App. Q-3.

REASONS WHY THE STATES' PETITION SHOULD BE DENIED

I. PETITIONERS' FIRST POINT RESTS UPON A PREMISE REJECTED BY THIS COURT AND CONTRARY TO THE RECORD BELOW, AND SEEKS REVIEW OF AN ALTERNATIVE (AND SOUND) HOLDING

Petitioners States challenge the decision below because it affirms FERC's regulation of transmission used for unbundled retail electric sales, arguing that this is an impermissible regulation of "the transmission of electricity from a generator to a retail customer in the same state ...." Pet. 10. Their objection rests upon the discredited premise that a modern electric system directly transmits electrons "from a generator to a retail customer." *Id.* This is not how an integrated and interconnected electric transmission system works. The precedent of this Court and the decision and order below correctly find that power on an integrated and interconnected electric system "comes from a variety of sources" and is "commingled just as molecules of water from different sources (rains, streams, etc.) [are] commingled in a reservoir." *FPC v. Florida Power & Light Co.*, 404 U.S. 453, 461 (1972). This commingled power is energy transmitted "in interstate commerce" within the meaning of the Federal Power Act ("FPA") and thus transmission subject to FERC's jurisdiction.

The FPA authorizes FERC to regulate "the transmission of electric energy in interstate commerce." FPA § 201(a), 16 U.S.C. § 824(a) (1994). Based upon this language, as construed by this Court, the D.C. Circuit affirmed FERC's jurisdiction over the transmission component of unbundled retail sales. The decision properly found this Court to have held that FERC had plenary jurisdiction over the

transmission by nearly[5] "every privately owned interconnected [utility] in the United States ...." Pet. App. C-33 (quoting *FP&L*, 404 U.S. at 471 [Douglas, J., dissenting]).[6] *FP&L* is consistent with FERC's expert determination below: transmission used to support unbundled retail sales, like all transmission, is transmission of a commingled stream of electrons from multiple, including interstate, sources.[7] "Because of the highly integrated nature of the electric system, ... most transmission of electric energy [is] 'in interstate commerce.'" Pet. App. D-90.

There is no support in the decision or orders below (or otherwise) for the States' contention that there is direct transmission of electricity from a generator to a retail customer in the same state. At best, the States' jurisdictional challenge rests upon a fictional "contract path for a particular power or transmission sale ...." Pet. App. D-90. But as the decision and order below correctly recognize, this Court has held that federal jurisdiction follows the "engineering and scientific" flow of electricity, not fiction. Pet. App. D-91; *see also* Pet. App. C-31–33 (same).

Contrary to States' fourth question (Pet. i), the D.C. Circuit did not improperly defer to FERC's interpretation of its

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[5] There is intrastate transmission in Alaska, Hawaii and (arguably) portions of Texas because electric utility systems in these states are not interconnected (or interconnected only through direct current ties) with electric systems in other states. The States concede that FERC is not seeking to exercise jurisdiction over such transmission. Pet. 16 n.10. *See also* Pet. App. D-43 n. 541.

[6] The decision below strongly suggests that FERC could exercise jurisdiction over the transmission component of bundled retail electric sales, but as "a statutorily permissible policy choice" declined to do so. Pet. App. C-34.

[7] Contrary to States' assertion (Pet. 12), *FP&L* did involve federal preemption of state regulation. *FP&L* affirmed the Federal Power Commission's ("FPC") finding that Florida Power "must comply with all ... requirements of the Commission's Regulations under the [FPA]." *Florida Power & Light Co.*, 37 F.P.C. 544, 546 (1967), *aff'd*, 404 U.S. 453 (1972).

jurisdiction. As the States concede (Pet. 7), deference is an alternative holding reached only after the decision affirmed FERC's jurisdiction based on this Court's precedent construing the FPA. This alternative holding does not raise a question worthy of certiorari.

In any event, such deference is consistent with numerous decisions of this Court. *See, e.g., Massachusetts v. Morash*, 490 U.S. 107, 116-118 (1989); *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 380-81 (1988) (and cases cited therein). Seeking to rely upon *Hillsborough County v. Automated Medical Labs, Inc.*, 471 U.S. 707, 715 (1985), a decision not involving the FPA, the States argue that it is wrong to defer to FERC's interpretation of its jurisdiction because the FPA reserves certain powers to the states. However, in *MP&L*, decided subsequent to *Hillsborough*, Justice Scalia, writing in concurrence, explained that the *MP&L* Court did just that, *i.e.*, deferred to FERC's assertion of jurisdiction over purportedly state matters. *MP&L*, 487 U.S. at 380-81. Similarly, in *FP&L*, 404 U.S. at 463, the Court deferred to the FPC's "technical expertise and experience" in affirming federal jurisdiction over matters allegedly left to the states.

It is not clear there is a conflict between the decision below and *Northern States Power Co. v. FERC*, 176 F.3d 1090 (8th Cir. 1999), *cert. denied*, 120 S. Ct. 1221 (U.S. 2000). *NSP*, 176 F.3d at 1096, held only that FERC had "no jurisdiction ... over the state's regulation of NSP's bundled retail sales activities," based upon FERC's own jurisdictional "conce[ssion]." If States' reading of *NSP* were correct, that decision would be in conflict with the holding in *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 636 (1972), that under the Natural Gas Act the FPC has authority over all interstate gas transportation, including transportation of bundled retail sales.

II. THE STATES' SECOND POINT RESTS UPON THE INVALID PREMISE THAT THE STATES CAN REGULATE WHOLESALE ELECTRIC POWER SALES

The States' argument that Order 888 improperly extends FERC jurisdiction to facilities used in local distribution of electric energy (Pet. 19-21) is equally misconceived. FPA section 201(b)(1) grants FERC jurisdiction over "all facilities" used by public utilities for the interstate transmission or wholesale sale of electric energy. The provision goes on to state that "except as specifically provided in this subchapter and subchapter III of this chapter," *i.e.*, Parts II and III of the FPA, FERC lacks jurisdiction "over facilities used in local distribution." As the D.C. Circuit correctly found, the FPA subordinates state jurisdiction over local distribution facilities to FERC jurisdiction over interstate transmission and sales at wholesale. Pet. App. C-37. Far from being an expansion of FERC jurisdiction, Order 888 confirms jurisdiction FERC and the FPC have for decades exercised over delivery over low-voltage power delivery facilities of wholesale sales of electric energy.

The necessary and faulty premise of States' position is that the states can regulate aspects of wholesale sales transported on low voltage distribution systems. States' position is irreconcilable with *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83, 89 (1927), finding the states powerless to regulate wholesale electric sales, and an "unbroken chain" of wholesale (gas) transport. This unbroken wholesale delivery chain exists under the FPA and bars states from regulating the low voltage delivery component of wholesale sales. *See United States v. Pub. Utils. Comm'n*, 345 U.S. 295, 310-11, 316 (1953) (neither FPA § 201(a) nor the use of local distribution facilities in effecting a sale preserve State commission jurisdiction over sales for resale in interstate commerce). "FERC's assertion of jurisdiction over all wholesale transmissions, regardless of

the nature of the facility, is clearly within the scope of its statutory authority." Pet. App. C-37.

The States' reliance on *Connecticut Light & Power Co. v. FPC,* 324 U.S. 515 (1945) is misplaced because the Court did not find that the states could regulate the low voltage distribution component of wholesale sales by public utilities. *See Arkansas Power & Light Co. v. FPC*, 368 F.2d 376, 383 & n.8 (8th Cir. 1966). Contrary to States' claim (Pet. 20), *Wisconsin-Michigan Power Co. v. FPC*, 197 F.2d 472, 477 (7th Cir. 1952), held that low-voltage delivery facilities used to deliver wholesale transactions were not "local distribution facilities" exempt from FPC jurisdiction because "at no point before the delivery to [the wholesale customer] has been completed, [is] interstate transmission terminated." Also, contrary to States' petition (Pet. 20), the reasoning of *Duke Power Co. v. FPC,* 401 F.2d 930, 942 (D.C. Cir. 1968), is that Duke's low voltage facilities would have been FPC "jurisdictional facilities ... [if they were] engaged in the ... sale at wholesale of electric energy in interstate commerce," but they were not. *Id.* at 950.

CONCLUSION

For these reasons, the petitions for writ of certiorari of the States and Dalton should be denied.

Respectfully submitted,

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